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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, OCTOBER 28, 2002

PETITION OF

CAVALIER TELEPHONE, LLC

CASE NO. PUC-2002-00088

For Injunction Against Verizon
Virginia Inc. for Violations of
Interconnection Agreement and For
Expedited Relief to Order Verizon
to Provision Unbundled Network
Elements in Accordance with the
Telecommunications Act of 1996

ORDER DIRECTING INVESTIGATION

On April 19, 2002, Cavalier Telephone, LLC ("Cavalier") filed the above-captioned Petition, docketed in Case No. PUC-2002-00088, with the State Corporation Commission ("Commission"). Cavalier operates in Virginia as a competitive local exchange carrier ("CLEC"). Cavalier complains of the "no construction" policy asserted by Verizon Virginia Inc. ("Verizon Virginia") in refusing to provision certain orders for DS-1 unbundled network element ("UNE") loops. Cavalier maintains that the application of Verizon Virginia's "no construction" policy results in Verizon Virginia breaching: (1) its obligations under § 251(c)(3) of the Telecommunications Act of 1996 ("Act"); (2) specified sections of Attachment III to its

Interconnection Agreement;¹ (3) Verizon Virginia's obligation "to make available network features, functions, interface points, and other service elements on an unbundled basis" pursuant to 20 VAC 5-400-180 F; (4) Federal Communications Commission ("FCC") rules at 47 C.F.R. § 51.311, § 51.313, and § 51.319; (5) several FCC orders; and (6) this Commission's Bell Atlantic/GTE Merger Order² to adopt the "best practices" of the pre-merged entities. Cavalier also cites § 251(d)(3) of the Act and § 56-247 of the Code of Virginia to support this Commission's investigation and ordering of further unbundling requirements for Verizon Virginia.

On May 10, 2002, Verizon Virginia filed a combined Motion To Dismiss, Answer, and Affirmative Defenses. Verizon Virginia states its policy in this regard at page 5 of its Motion To Dismiss:

Consistent with the FCC's rules, Verizon will not: (a) deploy new copper or fiber facilities, (b) deploy new multiplexers in the central office or at the customer's premise where existing equipment is fully utilized, (c) deploy a new apparatus case on

¹ For Cavalier's present Interconnection Agreement with Verizon Virginia, Cavalier elected pursuant to § 252(i) of the Act to adopt the Agreement between Verizon Virginia and MCI Metro Access Transmission Services of Virginia, Inc. Cavalier filed a Petition for Arbitration of a new agreement with Verizon Virginia on August 14, 2002, in Case No. PUC-2002-00171. An Order of Dismissal was issued on October 11, 2002, allowing the parties to request arbitration by the Federal Communications Commission.

² *Joint Petition of Bell Atlantic Corporation and GTE Corporation for Approval of Agreement and Plan of Merger*, Order Approving Petition, Case No. PUC-1999-00100, at 8, 14 (Nov. 29, 1999).

the loop or transport facilities where existing equipment is fully utilized, (d) reconfigure a multiplexer (that is, rewire and reprogram a shelf on the multiplexer from DS-3 to DS-1), or (e) deploy new facilities where it cannot correct a defect in existing facilities and no spare facilities are available.

Verizon Virginia responds in its Motion To Dismiss, Answer, and Affirmative Defenses that it is under no duty based upon the Interconnection Agreement, federal law, or state law to accommodate Cavalier on DS-1 UNE loop orders rejected under Verizon Virginia's policy, and that Cavalier's Petition fails to state a claim upon which relief may be granted and should be dismissed. Verizon Virginia urges the Commission to defer to the FCC, which it contends is the proper forum to consider this matter.³

On May 22, 2002, Cavalier filed a Response to Verizon Virginia's Motion to Dismiss. Cavalier asserts, among other things, that: (1) Cavalier has alleged a valid claim under Virginia law; (2) the FCC's loop conditioning rules do not favor dismissal; (3) FCC and United States Supreme Court decisions do not support Verizon Virginia's arguments; (4) the Commission

³ Verizon Virginia submits that the proper forum for the relief Cavalier requests is the FCC's triennial review of UNEs, docketed by the FCC. See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Development of Wireline Service Offering Advanced Telecommunications Capability*, 16 FCC Rcd 22781, ¶ 63 (2001).

identified Verizon Virginia's provisioning practices as an area of concern in a previous complaint proceeding; and (5) the Commission should deny Verizon Virginia's Motion to Dismiss.

On June 30, 2002, Verizon Virginia filed a Reply in Support of its Motion to Dismiss. Verizon Virginia asserts, among other things, that: (1) the FCC already has held, in approving Verizon's § 271 application in Pennsylvania, that Verizon Virginia's DS-1 UNE provisioning policy is consistent with current FCC rules; and (2) Cavalier's reliance on recent United States Supreme Court precedent is grossly misplaced.

NOW UPON CONSIDERATION of the pleadings and the applicable law, the Commission finds as follows. We deny Verizon Virginia's Motion To Dismiss and direct the Commission's Staff ("Staff") to investigate and file a report in this matter.

We note that Cavalier's Petition raises a similar complaint over the policies and practices of Verizon Virginia as that raised by Broadslate Networks of Virginia, Inc. ("Broadslate"), and 360 Communications Company of Charlottesville d/b/a ALLTEL ("ALLTEL") in their separate petitions, docketed in Case Nos. PUC-2001-00166 and PUC-2001-00176. We denied motions by Verizon Virginia to dismiss the Broadslate and ALLTEL petitions.⁴ Both Broadslate and ALLTEL, however, withdrew their petitions

⁴ See Order Consolidating Cases and Assigning Hearing Examiner, Case Nos. PUC-2001-00166 and PUC-2001-00176 (November 16, 2001).

before full investigation was made by the Commission's Staff, and both cases were dismissed without prejudice.⁵

In the instant proceeding, pursuant to 5 VAC 5-20-100 B and 5 VAC 5-20-80 D, the Staff is directed to conduct an investigation into Verizon Virginia's policies and practices in provisioning DS-1 UNE loops to Cavalier. The Staff is directed to file a report on its investigation. The Staff's report also may include a brief on any legal issues relevant to its investigation. All parties are directed to respond to the Staff's discovery within ten business days.

On or before November 15, 2002, Verizon Virginia may file further explanation of its existing policies and practices in furnishing service and facilities ordered as UNE loops. Cavalier may file additional comments on the investigation no later than December 2, 2002. Verizon Virginia may file a responsive pleading no later than December 16, 2002. The Staff shall file a report on its investigation on or before January 16, 2003. Verizon and Cavalier may file comments on the Staff's report and any request for hearing on or before January 31, 2003.

⁵ See Order Dismissing Case, in Case No. PUC-2001-00166 (Feb. 20, 2002), and Order Dismissing Case, Case No. PUC-2001-00176 (Feb. 11, 2002).

Accordingly, IT IS HEREBY ORDERED THAT:

(1) The Motion To Dismiss filed by Verizon Virginia is denied.

(2) The Staff is directed to conduct an investigation into Verizon Virginia's policies and practices in provisioning DS-1 UNE loops to Cavalier, consistent with the findings above.

(3) On or before November 15, 2002, Verizon Virginia may file further explanation of its existing policies and practices in furnishing service and facilities ordered as UNE loops.

(4) On or before December 2, 2002, Cavalier may file comments on the investigation.

(5) On or before December 16, 2002, Verizon Virginia may file a responsive pleading to Cavalier's comments.

(6) On or before January 16, 2003, the Staff shall submit a report on its investigation, which may include a brief on any legal issues relevant to its investigation.

(7) On or before January 31, 2003, Verizon Virginia or Cavalier may file comments on the Staff's report and/or a request for hearing. Any request for hearing shall state why the issues raised cannot be adequately addressed in written comments.

(8) This matter is hereby continued pending further order of the Commission.